MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY RESPONSIVENESS SUMMARY TO PUBLIC COMMENTS RECEIVED ON THE MONTANA MOKKO, INC., STILLWATER FOREST PRODUCTS, INC., AND ROBERT PARMENTER CONSENT DECREE

February 12, 2008

In 2004, the Montana Department of Environmental Quality (DEQ) filed a lawsuit against a number of defendants to require the environmental cleanup of three neighboring and interrelated state superfund facilities, the Kalispell Pole and Timber, Reliance Refinery, and Yale Oil Corporation Facilities. DEQ has previously entered into Partial Consent Decrees (CDs) with three of the defendants, the Montana Department of Natural Resources and Conservation (DNRC), Swank Enterprises (Swank), and Exxon Mobil Corporation (Exxon), all of which have been approved by the Court. DEQ also has entered into a CD with the Kalispell Pole and Timber Company which underwent public comment concurrently with the one at issue.

On January 11, 2008, DEQ entered into a CD with Montana Mokko, Inc. (Mokko), Stillwater Forest Products, Inc. (Stillwater), and Robert Parmenter (Parmenter) (collectively referred to as the Mokko CD) that was lodged with the Court on January 11, 2008. DEQ solicited public comment on the document and the public comment period on this CD ran from January 12, 2008 until 11:59 MST on February 10, 2008. DEQ published notice of the comment period in the Daily Interlake, posted the document on its website, and provided specific notice to the Flathead County Commissioners, the Kalispell Mayor, the Kalispell City Council, area legislators, the Governor's Office, the Environmental Quality Council, and the non-settling defendants named in the lawsuit. At the request of the Kalispell City Council, DEQ held a public meeting in Kalispell on February 8, 2008.

DEQ has carefully considered all comments received. No changes were necessary to the CD as a result of public comment. In this document, DEQ describes the basis for the CD, responds to the comments received and indicates its intention to submit the CD to the Court for approval. Attached to this document is a list of the records in the administrative record upon which DEQ based its decision. These documents are being lodged with the Court for its review and a set of these documents is also available at DEQ's offices located at 1100 North Last Chance Gulch, Helena, Montana.[1]

I. Introduction to Superfund Law

DEQ is the agency charged with administration and enforcement of Montana's state superfund law, the Montana Comprehensive Environmental Cleanup and Responsibility Act (CECRA), §§

[1] DEQ previously submitted three volumes of administrative records to the Court for the DNRC and Swank Consent Decrees and two volumes of administrative records to the Court for the Exxon Consent Decree. This responsiveness summary uses some of those same documents; for those documents used in the prior record but not referenced herein, DEQ has deleted the Exhibit name from the Mokko administrative record list in order to avoid confusion. Administrative record documents used solely in the Mokko responsiveness summary have been assigned a new Exhibit number to avoid confusion.

75-10-701 et. seq., MCA. CECRA is based on the federal superfund law known as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 USC 9601 et seq.

CECRA imposes strict, joint and several liability for remediation of a CECRA facility on certain persons, including:

a. A person who owns or operates a facility where a hazardous or deleterious substance was disposed of (i.e., a current owner or operator);
b. A person who at the time of disposal of a hazardous or deleterious substance owned or operated a facility where the hazardous or deleterious substance was disposed of (i.e., a past owner or operator);
c. A person who generated, possessed, or was otherwise responsible for a hazardous or deleterious substance and arranged for disposal or treatment of the substance or arranged for transport for disposal or treatment (i.e., a generator); and
d. A person who accepts or has accepted a hazardous or deleterious substance for transport to a disposal or treatment facility (i.e., a transporter).

Section 75-10-715, MCA. CECRA also provides for defenses to and exclusions from liability. In addition, CECRA does not define a "facility" solely with respect to property ownership or boundaries but includes within the definition of "facility" "any site or area where a hazardous or deleterious substance has been deposited, stored, disposed of, placed, or otherwise come to be located." Section 75-10-701(4)(a)(ii), MCA.

One of the purposes of CECRA is to "encourage private parties to clean up sites." Section 75-10-706(1)(b), MCA. To that end, DEQ is encouraged to "expedite effective remedial actions and minimize litigation" by entering into settlement agreements with liable persons. Section 75-10-723, MCA. DEQ is given broad discretion to enter into settlement, guided by the principles that any settlement be "practicable and in the public interest." *Id*. Such settlement may contain whatever terms and conditions DEQ, "in its discretion determines to be appropriate." *Id*.

II. Background on Facilities and Liable Persons

There are three facilities that are the subject of the current litigation. These facilities are very complex due to the nature of the contamination, site geology and conditions, and the fact that plumes of contamination have commingled together. (Exhibit A, Page 35; Exhibit ZZ, Page ES-1)

Kalispell Pole and Timber (KPT)

The KPT Facility is upgradient with respect to groundwater flow of the other two facilities. (Exhibit L, Figure 1-2) DEQ believes it is contributing the most environmentally damaging contamination of the three facilities. The KPT Company (KPTCo) operated a wood-treating operation from approximately 1945 to 1990 on property KPTCo owned as well as property it leased from the BNSF Railway Company (BNSF)[2]. (Exhibit C, Pages 3 and 5, Exhibit D, Pages

[2] When referring to BNSF, it includes the predecessor companies of BNSF. When referring to DNRC, it includes the predecessor agency of DNRC, the Montana Department of State Lands. When referring to DEQ, it includes the

5 and 15) Beginning in 1971, the KPTCo also leased property from DNRC for the purpose of pole storage. (Exhibit C, Page 4) The KPTCo used pentachlorophenol (PCP) mixed in a petroleum-based carrier solution to treat the wood (Exhibit D, Page 16), which resulted in contamination of soils and groundwater with PCP, petroleum, dioxins/furans, and other hazardous substances. (Exhibit D, Page 21, Exhibit E, Page 11) When the KPTCo dissolved in 1990, it sold its real property to Mokko and Swank. (Exhibits F and G) BNSF continued to lease its real property to Klingler Lumber Company (Exhibit H, Pages 3-4) and Mokko, who constructed a finger-joining facility and sawmill. (Exhibit SS) In 1992, Klingler Lumber Company purchased some property at the facility from Swank. (Exhibit H, Attached Deed from Swank to Klingler) Currently, Klingler Lumber Company is operating at the KPT facility both on property it owns and property it leases from BNSF and Glacier Stone Company is operating on property it leases from Mokko, Stillwater, and BNSF. (Exhibit ZZ)

The liable persons at this facility named in the litigation include: the KPTCo, BNSF, DNRC, Klingler Lumber Company, Mokko, and Swank.

Reliance Refinery Company

The Reliance Refinery Facility is located immediately east of the KPT Facility. (Exhibit L, Figure 1-2) The property was used as a petroleum refinery and cracking plant from the 1920s through about 1958. (Exhibit A, Page 2) DNRC took title to the property on December 26, 1933 through a Sheriff's Deed Under Foreclosure after the Reliance Refining Company that owned the property quit paying its taxes. (Exhibit J) DNRC then leased the property to Boris Aronow dba the Unity Petroleum Company until 1969. (Exhibit A, Page 2) Refinery operations resulted in contamination of soils and groundwater with petroleum, and lead contamination has also been found in soils. (Exhibit A, Pages ES-2 and ES-3) The DNRC property was leased to the KPTCo from 1969 to 1990 (when the KPTCo dissolved), during which time it was used for storage of poles. (Exhibit C, Page 4) BNSF owns a spur line that runs through the facility. (Exhibit T)

The liable persons at this facility named in the litigation include: BNSF, DNRC, KPTCo, and Swank.

Yale Oil Corporation Facility

The Yale Facility is located south/southeast of the Reliance Refinery Facility. (Exhibit L, Figure 1-2) The property was used by Exxon as a refinery beginning in the 1930s and then beginning in the 1940s, it was used by T.J. Landry Oil Company, Inc. as a bulk fuel storage facility until about 1978. (Exhibit K, Page 4) The operations resulted in contamination of soils and groundwater with petroleum. (Exhibit K, Pages 11-34) The liable person at this facility named in the litigation includes Exxon. In addition, the defendants named at the other two upgradient facilities are liable for the Yale Facility to the extent that contamination from the upgradient facilities has commingled with any contamination from the Yale Facility.

Relationship of the Three Facilities

As described above, each person is subject to strict, joint and several liability for a facility which includes any area where contamination from that facility has come to be located. For example,

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predecessor agency of DEQ, the Montana Department of Health and Environmental Sciences. When referring to Exxon Mobil, it includes the predecessor companies of Exxon.

even though BNSF never owned or operated the Yale Facility, CECRA holds BNSF responsible for cleaning up the groundwater at Yale since contamination in that groundwater came, in whole or in part, from BNSF upgradient facilities for which BNSF is a liable person. (See Exhibit B, Page 6, which explains that businesses located on the Reliance and Yale Facilities did not use PCP in their operations and Exhibit L, Page 6-1, which states that the PCP plume extends to GWY-14, a monitoring well on the Yale Facility; see also Exhibit ZZ.)

Relationship of the Three Settling Entities

DEQ named Mokko as a defendant in the lawsuit and also identified "Does 1 to 100." At the time DEQ instituted the case, whether there was contamination on the property owned by Parmenter was unknown and it was not until DEQ completed the RI that this data gap was filled. However, DEQ anticipated that the property may be impacted by contamination from the KPT Facility and specifically included "Does 1 to 100" to allow for the inclusion of Parmenter, if necessary.

Mokko owns Parcel 11C within the KPT facility. (Exhibit OOO) Mokko has not operated on the property since approximately 1993 and this real property comprises the company's sole asset. The sole shareholder of Mokko is Parmenter.

Parmenter previously owned Parcel 11CA, which is adjacent to the Mokko property. In 1993, the property was transferred to Stillwater although, through an oversight, the deed was not filed until 2006. Stillwater is no longer operating and is inactive corporate status. The sole shareholders of Stillwater are Parmenter and his son. The company's primary asset is the real property within the KPT facility boundary. Based on information provided to DEQ, the property is fully encumbered; in fact, the lessee on the property makes the lease payments directly to the mortgage holder. (Exhibit NNN)

Mokko, Stillwater, and Parmenter all consented to allow DEQ to review their confidential financial records, including tax returns, assets, and debts. (Exhibit VVV) Although there are three entities included in the CD, they are all essentially the same in that they are Parmenter and his family non-operating businesses.

III. The Consent Decree Process

A Consent Decree provides a mechanism for DEQ to settle with a liable person and provide contribution protection from other liable parties to that person. Section 75-10-719, MCA, provides that a person who has resolved his liability under CECRA is not liable for claims of contribution regarding matters addressed in the settlement.

The process for reaching agreement under a Consent Decree requires that DEQ gather information and conduct fact finding to assist it in determining reasonable terms of settlement. DEQ enters into negotiations with a liable person to attempt to reach settlement. If the terms of a Consent Decree are reached and the document is executed between the parties, DEQ then lodges it with the Court and requests public comment on the document. Public comment is an important part of the process and is required under § 75-10-713(1)(a), MCA. In fact, DEQ may modify or withdraw its consent to the Consent Decree if comments received disclose facts or considerations

that indicate that the Consent Decree is inappropriate, improper or inadequate. See Section XX of the Mokko CD. If DEQ believes the settlement is consistent with CECRA's goals and is reasonable and fair, DEQ then asks the Court to approve it.

A. Consistency with CECRA's goals

As discussed, a Consent Decree must further certain legislative goals as set forth in CECRA. The primary goal of CECRA is to ensure protection of public health, safety, welfare and the environment. Section 75-10-706, MCA. The two major policies underlying superfund laws in general and CECRA in particular are prompt and effective cleanup and holding persons designated as liable persons under § 75-10-715, MCA, responsible for their approximate share of the hazard and consequent cleanup costs. See U.S. v. Charter Intl. Oil Co., 83 F.3d 510, 522 (1st Cir. 1996) (citing Cannons Engr., 899 F.2d at 89-91; U.S. v. Rohm & Haas Co., 721 F. Supp. 666, 680 (D.N.J. 1989)). Legislative intent underlying superfund liability was to expedite an effective response while minimizing litigation. U.S. v. Atlas Minerals & Chems., Inc., 851 F. Supp. 639, 655 (E.D. Penn. 1994) (citing Cannons Engr., 899 F.2d at 90-91). The primary goal of CERCLA and other superfund laws is to encourage early settlement. U.S. v. Montrose Chem. Corp. of Cal., 793 F. Supp. 237, 240 (C.D. Cal. 1992). Consent decrees are the tool through which such early settlement is achieved.

Superfund law was designed to encourage settlement and provide liable persons a measure of finality in return for their willingness to settle. Defendants in Superfund cases generally settle for substantially less--indeed, often for far less given the inherent problems of proof in these cases--than the asserted damages. This may lead non-settling parties to bear a share of the liability disproportionate to their comparative fault. However, this disproportionate liability is a recognized technique that not only promotes early settlements and deters litigation for litigation's sake, but also is an integral part of the statutory plan of superfund law. In this case, settlement with Mokko, Stillwater, and Parmenter furthers CECRA's goals and may encourage other defendants to consider settlement prior to trial.

B. Reasonableness

Based on Cannons, DEQ looks to three factors to determine if a Consent Decree is reasonable. The first factor that is considered is the decree's likely effectiveness for ensuring protection of human health and the environment. This is of cardinal importance. Except in cases which involve only recoupment of cleanup costs already spent or a settlement based on a percentage of future remediation and not a sum certain, the reasonableness of the consent decree, for this purpose, will typically be a question of technical adequacy, primarily concerned with the probable effectiveness of proposed remedial responses.

A second important facet of reasonableness will depend upon whether the settlement satisfactorily compensates the public for the actual (and anticipated) costs of remedial and response measures. Like the question of technical adequacy, this aspect of settlement can be enormously complex. The actual cost of remedial measures is frequently uncertain at the time a consent decree is proposed. In cases where a settlement is based on a certain percentage of future costs, this uncertainty is not important as the settling party has assumed the risk of an

overly expensive remediation. Where the settlement's bottom line is made definite by a sum certain to be paid by the settling party, the proportion of settlement dollars to total needed dollars is often difficult or impossible to determine with mathematical precision. In such instances DEQ will use its expertise and best efforts together with the available information to estimate the likely remediation and its costs. In the case at hand, DEQ has substantial amounts of information regarding the conduct and basis of liability for each party. DEQ has prepared a Final Draft Remedial Investigation (RI) and determined the nature and extent of contamination at the facilities. DEQ has also completed a Final Draft Feasibility Study (FS) (Exhibit CCC), Addendum to the FS (Exhibit DDD), and Proposed Plan (Exhibit EEE) which identifies DEQ's preferred alternative for remediating the facilities. DEQ is currently in the process of evaluating public comment on the FS and Proposed Plan.

The third reasonableness factor relates to the relative strength of the DEQ's case against the settling party. Where DEQ's case is strong and solid, it will require more in settlement. Conversely, where DEQ's case is weaker or the settling party has a strong defense to liability, or the outcome is problematic (it may take time and money to collect damages or to implement private remedial measures through litigation success), a reasonable settlement will ordinarily mirror such factors. In a nutshell, the reasonableness of a proposed settlement must take into account foreseeable risks of loss. DEQ believes its case against Mokko is solid. However, Mokko responded to DEQ's motion for summary judgment and asserted equitable defenses to liability. (Exhibit MMM) As discussed below, DEQ considered Mokko's defenses when evaluating the reasonableness of settlement. DEQ has no information that Parmenter contributed to any of the contamination and considered the fact that even if Parmenter could not perfect a defense to CECRA liability, any liability allocation to him in a contribution action by other defendants would be minimal at best. Any contribution of contamination by Stillwater (see discussion below) is minimal. In addition, Mokko, Stillwater and Parmenter lack resources to pay a judgment and DEQ took this into consideration when crafting the CD.

C. Fairness

Fairness of Consent Decrees includes concepts of both procedural fairness and substantive fairness. Procedural fairness speaks to the negotiation process that leads to the Consent Decree and to the parties' candor, openness, and bargaining balance. DEQ will ensure procedural fairness by conducting its negotiations forthrightly and in good faith. Substantive fairness requires that a settling party roughly bear the cost of the harm for which it is legally responsible. To ensure substantive fairness, settlement terms should be based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each liable person has done. DEQ will generally rely upon the application of liability factors provided under § 75-10-750, MCA, to the settling party and the known facts at the time of settlement to ensure substantive fairness of any Consent Decree. Individual site or party specific facts and the need to be faithful to the goals of CECRA will also be considered by DEQ to ensure substantive fairness. DEQ's evaluation of the CECRA factors is described below.

IV. Adoption of the Subject Consent Decree

Consideration of Allocation Factors

Section 75-10-750, MCA, lists the factors that DEQ considers in determining a fair and reasonable allocation of liability at a CECRA facility. They include:

1. the extent to which the person caused the release of the hazardous or deleterious substance;
2. the extent to which the person's contribution to the release of a hazardous or deleterious substance can be distinguished;
3. the amount or volume of hazardous or deleterious substance and the amount contributed by the person;
4. the relative hazard of the hazardous or deleterious substance contributed by the person, including volatility, carcinogenicity, mobility, persistence, reactivity, and toxicity;
5. the degree of past and present cooperation by the person with the government to prevent harm to the public health, safety, or welfare and the environment, including participation in remedial actions occurring concurrently with the allocation process and compliance and cooperation with discovery pursuant to [the Controlled Allocation of Liability Act];
6. what the person knew or should have known of the hazardous nature of the substance, the risk associated with that substance, and proper waste disposal practices;
7. the circumstances of the property acquisition, including the documented price paid and discounts granted;
8. the person's knowledge of or acquiescence to waste generation, storage, handling, treatment, or disposal;
9. the length of time of ownership, operation, generation, or transportation;
10. any violations of or noncompliance with health and environmental regulations, including permit violations or violations relating to public notification;
11. the degree to which a person providing publicly owned landfill or sewer and water systems had or has a reasonable ability to control disposed materials and the person's degree of care in maintaining those services;
12. the person's financial or economic benefit from (a) ownership or operation of the facility; (b) the generation, transportation, or disposal of the hazardous or deleterious substance; and (c) cleanup of the facility;
13. whether the person exercised due diligence in generating, transporting, or disposing of hazardous or deleterious substances and the person's control over those activities; and
14. other equitable factors that are appropriate.

DEQ focuses on evaluating these factors and conducts a comparative fault analysis to determine a reasonable range of liability for the settling defendant. As explained above, the parties then negotiate not only the liability assessment but also the other terms of the Consent Decree.

Because a final remedy has not yet been selected at the facilities, DEQ cannot say how much the final cleanup costs will be. However, DEQ has a significant amount of information regarding the operational history of each facility and the basis for each defendant's liability. Most importantly for purposes of the Mokko CD is the fact that the companies are not operating, have limited financial resources, and have minimal assets to contribute.

Mokko Consent Decree

After DEQ filed the subject lawsuit, it conducted discovery and held meetings with every defendant to discuss settlement options, including Mokko. The following summarizes DEQ's understanding of these settling parties' involvement at the facilities.

The KPTCo owned and operated a wood treating plant and storage yard from 1945 to 1990. The company approved dissolution of the corporation in 1990 and sold one of its parcels (11C) to Mokko on June 18, 1990. (Exhibit F) Mokko paid BNSF to expand the spur line to access Mokko's sawmill and finger-joining operation. (Exhibit ZZ) In September 1993, Mokko agreed to stipulation with regard to National Ambient Air Quality Standard for Particulate Matter and Montana Ambient Air Quality Standard for PM-10 after the Kalispell area was designated as a non-attainment area for particulate matter. The stipulation signed by Mokko was related to the overall plan to come into compliance with the standards. Mokko agreed to the following requirements (among others): not cause or authorize emissions to be discharged into the outdoor atmosphere from equipment on the property, from access roads, parking lots, log decks, or the general plant property (with some specific opacity levels); to treat all unpaved portions of the haul roads, access roads, parking lots, log decks, and the general plant area with water and/or chemical dust suppressant as necessary to maintain compliance; to operate and maintain all emission control equipment; and to submit an annual emission inventory. (Exhibit ZZ)

Shortly thereafter, Mokko ceased operations and, on November 1, 1993, transferred its assets to Stillwater with the exception of the real property, which Mokko kept. Parmenter also transferred the property that was held in his individual name to Stillwater in 1993, although because of an oversight the transfer deed was not filed until 2006. Stillwater then operated until sometime in 2006 when it ceased operations and became inactive. On May 19, 2006, Stillwater leased Tract 11CA to Glacier Stone Company. (Exhibit NNN) On June 29, 2007, Mokko leased Parcel 11C to Dave Wilkins, who is the owner of Glacier Stone Company. (Exhibit OOO) Glacier Stone Company is currently operating on Tracts 11C and 11CA. (Exhibit ZZ)

DEQ's understanding, from its own investigation and from the representations of Mokko, Stillwater and Parmenter, is that they lack assets and that the companies are no longer operating. This is a fundamental basis for DEQ's decision to enter into this Consent Decree.

As part of its evaluation of liability, DEQ considered all the factors contained in § 75-10-750, MCA, and conducted a comparative fault analysis. DEQ relied on its engineers and scientists to assess the technical information and relied on its attorneys to assess strengths and weaknesses of its litigation position and conducted arms-length negotiations with Mokko, Stillwater, and Parmenter.

The following is a brief summary of how DEQ considered the Section 75-10-750, MCA factors in applying them to the settling parties.

1. the extent to which the person caused the release of the hazardous or deleterious substance: Mokko purchased its property in 1990 from KPTCo. DEQ has no information that Mokko caused the release of any contamination, although there may be some limited areas of soil contamination from dioxins/furans on the Mokko property. (Exhibits F and ZZ) In 2005, DEQ inspected Stillwater's property and documented drums potentially containing petroleum-based substances on the property that were in various states of repair. (Exhibit PPP) Subsequent soil sampling showed limited petroleum contamination in this area. (Exhibit QQQ) Stillwater subsequently had an oil recycler (Ozzy's) remove the drums of used oil on the property and had the approximately three yards of petroleum-contaminated soil excavated and disposed of off-site. There is also sampling data on Stillwater's property indicating the presence of dioxins/furans in the surface soil (Exhibit ZZ) and buried sawdust. (Exhibit EEE)

2. the extent to which the person's contribution to the release of a hazardous or deleterious substance can be distinguished: Stillwater's property had petroleum contamination in an isolated area (Exhibit QQQ) and has dioxins/furans in the surface soil (Exhibit ZZ). The Stillwater property contains buried sawdust and some dioxins/furans in the surface soil. (Exhibit EEE) Based on DEQ's experience, the PCP and dioxins/furans contamination from KPTCo treating operations, centered on BNSF property, will drive the cost of cleanup.

3. the amount or volume of hazardous or deleterious substance and the amount contributed by the person: Based on current information, Mokko did not contribute any volumes of contamination at the facilities. Based on current information, if Stillwater contributed any volumes or amounts from the drums on its property, the contamination would be petroleum and the contribution minimal. DEQ considered Mokko's PM-10 violations at the facility, recognizing that Mokko operations ceased in 1993. There is no known contribution of any contamination by Parmenter.

4. the relative hazard of the hazardous or deleterious substance contributed by the person, including volatility, carcinogenicity, mobility, persistence, reactivity, and toxicity: Based on current information, Mokko did not contribute any volumes of contamination at the facilities. Stillwater's property had petroleum contamination in an isolated area. It also has dioxins/furans in the surface soil and contains buried sawdust. (Exhibits QQQ and EEE) However, the more hazardous and expensive contaminants to cleanup at these facilities are PCP and dioxins/furans, and the most heavily contaminated PCP source area is on BNSF property. (Exhibit B, Page 6 "Investigations confirm that the vast majority of PCP-contaminated soils are in the area of the KP&T treating process area.…"; see also Exhibit B, Page 7 "The soil and ground-water quality data clearly demonstrate that KP&T operations are the sole source of PCP to soil and ground water.")

5. the degree of past and present cooperation by the person with the government to prevent harm to the public health, safety, or welfare and the environment, including participation in remedial actions occurring concurrently with the allocation process and compliance and cooperation with discovery pursuant to [the Controlled Allocation of Liability Act]: DEQ

generally views Mokko, Stillwater, and Parmenter as cooperative parties. They have been forthright with information when DEQ has requested it and it appears that the limits in cooperation are directly related to the absence of assets.

6. what the person knew or should have known of the hazardous nature of the substance, the risk associated with that substance, and proper waste disposal practices: DEQ has no knowledge that Mokko, Parmenter, or Stillwater had particularized knowledge of the hazardous nature of the substances at the KPT facility and none of these parties disposed of most of the hazardous or deleterious substance at the facilities. However, DEQ believes it is reasonable to assume Mokko had, or should have had, at least a requisite knowledge of the hazardous substances on the property it was acquiring as it purchased the property from a wood-treating company.

7. the circumstances of the property acquisition, including the documented price paid and discounts granted: In 1990, the KPTCo sold Tract 11C to Mokko for $7,500. (Exhibit KKK) Based on the current assessed value of the property, DEQ believes Mokko purchased this property at a discount from a company going out of business. Parmenter purchased Tract 11CA on December 30, 1986. The assets of Mokko were transferred to Stillwater on November 1, 1993 although the deed was not filed until March 27, 2006. DEQ does not have information regarding how much Parmenter paid for the property.

8. the person's knowledge of or acquiescence to waste generation, storage, handling, treatment, or disposal: The KPTCo Board of Directors' minutes indicate that environmental reports were provided to Mokko prior to the date of purchase. (Exhibit X) In addition, Mokko purchased the property from a wood-treating company. (Exhibit F) Therefore, actual or constructive knowledge of waste disposal may be imputed to Mokko. The Parmenter/Stillwater property was never the site of any known KPTCo operations and DEQ has no information regarding Parmenter/Stillwater's knowledge of waste disposal.

9. the length of time of ownership, operation, generation, or transportation: Mokko owned the property from 1990 until now. (Exhibit F) Parmenter purchased Tract 11CA on December 30, 1986 and transferred it to Stillwater on November 1, 1993, although the deed was not recorded until March 2006. Stillwater owns the property currently.

10. any violations of or noncompliance with health and environmental regulations, including permit violations or violations relating to public notification: DEQ is aware of the PM-10 stipulation mentioned above and is not aware of any violations relating to Parmenter or Stillwater.

11. the degree to which a person providing publicly owned landfill or sewer and water systems had or has a reasonable ability to control disposed materials and the person's degree of care in maintaining those services: This factor does not apply to Mokko, Parmenter, or Stillwater.

12. the person's financial or economic benefit from (i) ownership or operation of the facility; (ii) the generation, transportation, or disposal of the hazardous or deleterious substance; and (iii) cleanup of the facility: Mokko, Parmenter, and Stillwater received financial and

economic benefit from ownership and operation of the real property because it provided a location to support the companies' operations. The property owned by Stillwater is subject to an Option Agreement with Wilkins Properties, LLC (Exhibit RRR) and the property owned by Mokko is subject to an Option Agreement with Dave Wilkins (Exhibit SSS).

13. whether the person exercised due diligence in generating, transporting, or disposing of hazardous or deleterious substance and the person's control over those activities: Mokko, Stillwater, and Parmenter were not involved in the operations of the KPT facility. The only information DEQ has regarding hazardous substances on Mokko is that there may be some dioxins/furans contamination in surface soil. Information regarding Stillwater property includes the drums potentially containing petroleum-based substances that were in various states of repair and an isolated area of petroleum contamination. (Exhibit PPP) There is also dioxins/furans contamination in the surface soil. (Exhibit ZZ) Stillwater subsequently had an oil recycler (Ozzy's) remove the drums of used oil on the property and had the petroleum-contaminated soil excavated and disposed of off-site. To the extent that Stillwater had control over disposal activities, it appears to have exercised due diligence.

14. other equitable factors that are appropriate. In early settlement discussions with Mokko, DEQ assessed Mokko's liability in a similar fashion to the way it had assessed Swank's liability, discussed in the Swank CD responsiveness summary. DEQ applied the 750 factors to the facilities and Mokko's situation by examining the number of liable person categories (owner, operator, arranger, or generator) and the number of facilities under which Mokko was liable under CECRA and comparing this to the same analysis for the other defendants. DEQ recognized any contribution from Mokko was likely small in quantity (potentially related to the PM-10 violation) as well as Mokko's relatively brief ownership of the property coupled with the lack of significant polluting activities. Early in the case, DEQ's target allocation for Mokko was 1.5%. Subsequent information generated during the lawsuit and the RI confirmed that any contamination on the Mokko property was minor compared to the contamination on other property, primarily that of BNSF and DNRC. Mokko quit operating in 1993 and its sole asset is Tract 11C. Stillwater quit operating in 2006 and its primary asset is Tract 11CA. Mokko, Stillwater, and Parmenter have provided detailed financial information to DEQ which indicate a limited ability to pay. In the CD, the companies agree to allow DEQ to use the real property in any way necessary to implement the remedial action, including the placement of land treatment units which could be on the property for many years. This could result in a significant cost savings to the other defendants because off-site disposal of the contaminated soil could increase the cleanup costs by tens of millions of dollars. The companies also agree to place whatever use restrictions or other institutional controls DEQ requires, to maintain active corporate status and pay all their taxes, mortgages, and assessments on the property; and to guarantee DEQ access to the property. In the CD, Parmenter is providing his personal guarantee for payment of the taxes, mortgages, and assessments. Mokko and Stillwater have also executed a lease agreement addendum with their lessees wherein the operations of the lessees agreed that their leasehold interest is subject to DEQ's rights under the CD. To the extent that the remedial activities reduce the abilities of the lessees' to use the property, the lessees can terminate the lease or reduce the lease payments. (Exhibit UUU) DEQ believes that overall this is an extremely valuable contribution to overall remediation of the facilities.

V. Responses to Public Comment

Only BNSF submitted public comments on the Mokko CD to DEQ. These comments are attached as Exhibit TTT. No other public comments were received by DEQ. Those paraphrased comments and DEQ's responses are below.

Comment 1: The CD is premature as DEQ has not yet released the Record of Decision. Until a remedy is selected, DEQ is unable to determine the extent of future costs.

Response: DEQ carefully analyzed the factors found in § 75-10-750, MCA, as described above and applied a comparative fault analysis. After considering all information and balancing all the factors, DEQ believes that this settlement is consistent with CECRA's goals of encouraging settlement and providing Mokko, Stillwater, and Parmenter a measure of finality in exchange for their willingness to settle. In the case at hand, DEQ has substantial amounts of information regarding the conduct and basis of liability for each party. DEQ used its expertise and best efforts together with the available information to determine a fair and reasonable settlement and is entitled to deference in its determinations. As Judge Sherlock pointed out in his March 14, 2006 Memorandum and Order which approved the DNRC and Swank CDs, DEQ is "not required to show precise knowledge as to the source or cause of contamination or the total amount it will cost to complete cleanup" before settling with a liable party. (Exhibit BBB, page 7)

Comment 2: DEQ cannot settle with Mokko, Stillwater, or Parmenter because the settlement provides them with a covenant not to sue and contribution protection without any requirement that they pay any past or future remedial action costs. This is contrary to § 75-10-719(4), MCA, which requires DEQ to take into account toxicity information and the volume contributed by the settling party as well as an evaluation the credibility of a claimed defense.

Response: Section 75-10-719(4), MCA, addresses *deminimis* and *demicromis* settlements and involves an evaluation of volume, toxicity, etc. The detailed portions of these provisions were added to CECRA during the 1997 legislative session and were intended to provide DEQ additional authority on how to deal with "small" players at Superfund sites. The provisions were not meant to and do not limit DEQ's ability to settle with other parties. DEQ can settle with other parties, including Mokko, Stillwater, and Parmenter, under § 75-10-719, MCA, which allows for settlement and contribution protection, and § 75-10-723, MCA, which provides "[t]o expedite effective remedial actions and minimize litigation, [DEQ], in its discretion and whenever practicable and in the public interest, may negotiate and enter into an agreement…to perform a remedial action if [DEQ] determines that the action will be properly done by the person. The agreement must contain terms and conditions that [DEQ] in its discretion determines to be appropriate." DEQ has the ability to enter into administrative settlements, administrative orders on consent, and consent decrees. Given the ongoing nature of the present lawsuit, DEQ has elected to seek judicial approval of the CD from this Court. DEQ's discretion to settle was recognized by Judge Sherlock in his March 14, 2006 Memorandum and Order (Exhibit BBB, Page 7). The determinations which guide *deminimis* and *demicromis* settlements have no relevance to this CD nor to DEQ's ability to settle with Mokko, Parmenter or Stillwater and offer contribution protection under § 75-10-719(1), MCA.

Comment 3: BNSF has incurred significant expenses in conducting remedial actions. It is inappropriate to include a contribution protection clause in the CD when no court has determined appropriate allocation among all the defendants in the subject litigation. In addition, the Montana Supreme Court has indicated none of the CDs are binding until all claims have been fully resolved.

Response: The ability to offer contribution protection to a settling defendant is critical to DEQ's ability to settle Superfund cases. BNSF argued against contribution protection in the DNRC, Swank, and Exxon CDs and that argument was rejected by the District Court. (Exhibit BBB, Page 6; Exhibit GGG, Page 17). Unlike its case against DNRC and Swank, BNSF did not file any claims against Mokko, Stillwater or Parmenter so it is unclear why BNSF would object to the contribution protection. This factor was noted by the Court in approving the Exxon CD (Exhibit GGG, Page 19). The purpose of settlement is to provide finality to a party in exchange for that party accepting a fair and reasonable share of liability that promotes CECRA's purpose and the public's interest – by ensuring protection of public health, safety and welfare and the environment. There is no question that the CD between Mokko, Stillwater and Parmenter and DEQ meets all the requirements necessary to be accepted by the Court. As to the terms of the Montana Supreme Court's Order (attached to Exhibit TTT), that document speaks for itself. The CDs DEQ enters with defendants are final when approved by the District Court, subject only to the appeal rights of nonsettling parties. Nothing in that Order prohibits DEQ from settling with defendants in the subject litigation and BNSF can appeal those settlements "only once the District Court enters a final judgment adjudicating the rights and liabilities of all the parties."

Comment 4: The court lacks jurisdiction over Stillwater and Parmenter because DEQ did not include them in the lawsuit.

Response: Under CECRA, the court has jurisdiction over any party wishing to settle with DEQ through a Consent Decree. Sections 75-10-719 and 723, MCA. DEQ included Stillwater and Parmenter in the CD for the reasons outlined above. DEQ believed it prudent to include them so that other interested parties would have an opportunity to comment on the settlement through the CD process and to avoid any arguments that DEQ was trying to circumvent the Court's authority at these facilities. Moreover, DEQ believes the settlement is appropriate because "Does" were included in the litigation and Mokko, Parmenter, and Stillwater are in many ways the same "entity." DEQ also has the ability to settle with parties administratively and if the Court determines it lacks jurisdiction over Stillwater and Parmenter, then that is what DEQ will do.

Comment 5: The Proposed Plan recommends excavation of sawdust on the Stillwater property and Stillwater should be required to pay the costs of remediating the sawdust.

Response: BNSF commented extensively on the inclusion of sawdust in the Proposed Plan and DEQ is currently evaluating and carefully considering those comments. A final determination on the sawdust issue has not been reached. In any case, if the sawdust requires remediation, that is a cost that must be shared by all jointly and severally liable persons. Like all defendants, BNSF had the opportunity to resolve its liability in a CD with DEQ. In choosing to litigate its liability instead of settling, BNSF took the risk that a larger share of the liability would ultimately fall on

it. That increased risk of BNSF's own choosing is no reason to deny other parties an opportunity to settle their liability.

Comment 6: DEQ's public comment process violates CECRA and the Court's scheduling order dated January 24, 2007 because DEQ did not accept verbal comments during a public meeting requested by the Kalispell City Council.

Response: The Court's scheduling order required that DEQ conduct the public comment period "required by Section 75-10-713(1)(a)(ii), MCA." The Court's order did not require DEQ to request more public comment on future CDs than that required by CECRA. (Exhibit III) Section 75-10-713, MCA, requires DEQ to seek public comment before judicial approval of a CD. The statute referenced in the Court's order and cited by BNSF (§ 75-10-713(1)(a)(ii), MCA) does not apply to a request by the city council. That statute, which does contemplate verbal comments at a public meeting, applies to a request by "10 or more persons or by a group having 10 or more members (but not including a liable person)…." Subsection (3)(b) of that statute requires DEQ to "conduct a public meeting" at the request of the city council. Subsections (1)(a)(ii) and (3)(b) clearly differentiate public meetings requested by a local governing body and those requested by groups of other people and the January 31, 2008 letter referenced in the comment addressed that difference. In any case, during the February 8, 2008 meeting, DEQ responded to questions and comments, all of which were about the facilities in general, DEQ's proposed cleanup, and redevelopment and none of which were about the Mokko CD.

Comment 7: Paragraph 8 of the CD says that contamination from the KPT facility has co-mingled with contamination from the Reliance and Yale facilities which is no longer accurate and should be revised.

Response: PCP was detected in soil at a concentration of 880 mg/kg at sample location TP-3-94, collected from 20 feet below ground surface (bgs). PCP was detected at a concentration of 240 mg/kg at sample location TP-2-94, collected from 10 feet bgs. These samples were collected from the southern portion of the Reliance facility in 1994, and show that contamination from the KPT facility had impacted the smear zone soils at the Reliance facility. Additionally, the historic presence of contamination in wells GWRR-9 (on the Reliance facility), GWY-4, GWY-10, GWY-12, GWY-13, GWY-14, and CLCW-1 (all on the Yale facility) is further evidence of the commingling of contamination from the KPT facility with that from the Reliance and Yale facilities. In the more recent RI sampling, a concentration of 40 ppb PCP was detected in the deeper portion of the aquifer just across the highway from the Yale facility at well KRY-129B. Well GWY-10 had a PCP concentration of 1 ppb during the RI sampling, which is the DEQ-7 standard. Additionally, sampling detected dioxin above background concentrations (also above the DEQ-7 standard), at GWY-10 and at KRY-129B, which is across the highway from the Yale facility in the deeper portion of the aquifer. (Exhibit ZZ) This RI data was collected during June and July which is from a high water period and which DEQ believes clearly indicates there are impacts to the groundwater water in the vicinity of and downgradient of Yale facility from the KPT facility.

Comment 8: The administrative record is deficient of evidence of the financial state of Mokko, Stillwater and Parmenter and DEQ is acting in an arbitrary and capricious nature in making the allegations regarding financial holdings in Paragraph 14 of the CD.

Response: As an initial matter, DEQ has made administrative findings as to the financial condition of the settling parties, not "allegations." As part of settlement discussions, DEQ required that Mokko, Stillwater and Parmenter consent to allow DEQ to review their financial records, including tax returns, assets, and debts, and these records are in DEQ's confidential site files. (Exhibit VVV) All three signed a Power of Attorney to enable DEQ's attorney to obtain information directly from tax agencies, which was done. DEQ has individual tax returns for Parmenter, who files jointly with his wife, for 2003, 2004, and 2005. (His 2006 returns have not yet been filed.) DEQ has corporate tax returns for Stillwater for 2000, 2001, 2002, and 2003. There are no tax returns after that date because Stillwater ceased operating. The Stillwater tax returns contain information regarding compensation made to various members of the Parmenter family and include their social security numbers. Mokko has not filed a tax return since 1993; in fact, the Montana Department of Revenue does not even have Mokko in its system. DEQ received information on Stillwater's assets and debts from its CPA firm in Kalispell, including confirmation that Mokko's and Stillwater's only asset is the real property. DEQ has diligently reviewed and pursued financial records for all the settling parties. DEQ informed the settling parties that this information would be kept confidential under the provisions of the Montana Constitution, Article II, Section 10 (Right of Privacy). The information not considered strictly private, such as the lease agreements, option agreements, etc., were placed in the public files and copies were provided to BNSF. As stated in Paragraph 38(d) of the CD, the settling parties certified that they had provided all financial and asset information to DEQ, which DEQ has carefully reviewed and which form the basis for DEQ's determinations regarding financial ability to pay. If in the future this certification is shown to be false, the benefits under the CD would be lost to Mokko, Parmenter and/or Stillwater. In addition, as stated above, the settling parties have contributed value to the remediation at the facilities in that the companies agree to: allow DEQ to use the real property in any way necessary to implement the remedial action, including the placement of land treatment units which could be on the property for many years; place whatever use restrictions or other institutional controls DEQ requires; maintain active corporate status; pay all their taxes, mortgages, and assessments on the property; and guarantee DEQ access to the property. In the CD, Parmenter is providing his personal guarantee for payment of the taxes, mortgages, and assessments. Mokko and Stillwater have also exercised lease agreement addendum with their lessees wherein the operations of the lessees agreed that their leasehold interest is subject to DEQ's rights under the CD. To the extent that the remedial activities reduce the abilities of the lessees' to use the property, the lessees can terminate the lease or reduce the lease payments. (Exhibit UUU) DEQ believes this is a valuable contribution to overall remediation of the facilities. If anything, these settling parties' contribution to the remedial activities with the indefinite use of their property may far exceed any liability those parties would face from contribution claims asserted by other responsible parties.